

Does Criminal Law Matter? Thoughts on *Dean v. United States* and *Flores-Figueroa v. United States*

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I. INTRODUCTION

Twice last year the Supreme Court interpreted criminal statutes that were silent or ambiguous about the culpable mental state associated with a particular objective element. In the first case, *Dean v. United States*,¹ the statute at issue was 18 U.S.C. § 924(c)(1)(A)(iii), which defines an aggravated version of the offense of carrying a firearm during a federal crime of violence.² This section requires the government to prove that the defendant's firearm was "discharged" during the crime of violence.³ But it does not make any mention of a mental state associated with the discharge element.⁴ In *Dean*, the defendant's firearm appeared to have discharged accidentally.⁵ And so the question arose whether the government was required to prove a mental state with respect to the discharge, and if so which one.⁶ The defendant argued that the government was required to prove that he had

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¹ 129 S. Ct. 1849 (2009).

² See *id.* at 1852–53. Technically, this section defines a "sentencing factor" enhancement, rather than a separate offense. See *Harris v. United States*, 536 U.S. 545, 553 (2002); see also Reply Brief of Petitioner at 4–5, *Dean*, 129 S. Ct. 1849 (No. 08-5274) (acknowledging that the district court judge, rather than the jury, was responsible for deciding whether the discharge element in § 924(c)(1)(A)(iii) had been proved). This distinction has important procedural consequences. See *Harris*, 536 U.S. at 552–53. From a substantive perspective, though, the sentencing factor enhancement in § 924(c)(1)(A)(iii) does exactly what many offense elements do: trigger harsher penalties for more serious criminal conduct. See *Dean*, 129 S. Ct. at 1855 (comparing the discharge provision to the felony-murder rule, in which proof that the defendant caused the victim's death results in the imposition of increased punishment, and the Federal Sentencing Guidelines). The Court in *Dean*, accordingly, appears to have assigned no substantive significance to the fact that the discharge provision defines a sentencing factor enhancement, rather than a separate offense. See, e.g., *id.* at 1855–56 (explaining why the presumption of scienter does not require the assignment of a mental state to the discharge provision, and so tacitly rejecting the government's argument, set out in Brief for the United States at 10, *Dean*, 129 S. Ct. 1849 (No. 08-5274), that the presumption of scienter does not apply at all to sentencing enhancements).

³ 18 U.S.C. § 924(c)(1)(A)(iii) (2006).

⁴ See *id.*

⁵ 129 S. Ct. at 1852 (explaining that Dean had cursed and run out of the bank after the gun went off, and that witnesses to the robbery had later testified that "he seemed surprised that the gun had gone off").

⁶ *Id.* at 1852–53.

discharged the gun intentionally or knowingly.⁷ The government argued that Congress had meant, by its silence, not to require any mental state at all with respect to the discharge element.⁸

The question in the second case, *Flores-Figueroa v. United States*,⁹ took much the same form. The statute at issue in *Flores-Figueroa* was 18 U.S.C. § 1028A(a)(1), which defines an aggravated form of identity theft.¹⁰ This statute requires the government to prove that the defendant, in the course of committing any of several predicate offenses, knowingly used or possessed “a means of identification [belonging to] another person.”¹¹ In *Flores-Figueroa*, everyone agreed that the defendant had presented his employer with counterfeit social security and alien registration cards, and that the numbers on these cards were assigned to other people.¹² But the defendant insisted that he had not known—or at least that the government could not prove he had known—“that the numbers on the counterfeit documents were numbers assigned to other people.”¹³ And so the question arose whether the statutory mental state, “knowingly,” extended to the “belonging” element.¹⁴ The defendant argued that it did.¹⁵ The government argued that the “belonging” element had no associated mental state at all.¹⁶

The government prevailed in *Dean*;¹⁷ the defendant in *Flores-Figueroa*.¹⁸ Neither outcome is very interesting. What is interesting about the cases is how little help the Court got from the criminal law in resolving these quintessential criminal law questions. In *Flores-Figueroa*, the Court’s interpretation of the statute was based exclusively on what the Court described as rules of “ordinary English grammar.”¹⁹ In *Dean*, the Court’s interpretation of the statute was based, first, on textual cues—on the statute’s use of the passive voice²⁰ and on the statute’s omission of any explicit reference to mens rea²¹—and, second, on a

⁷ *Id.* at 1854.

⁸ Brief for the United States, *supra* note 2, at 10.

⁹ 129 S. Ct. 1886 (2009).

¹⁰ *Id.* at 1888.

¹¹ 18 U.S.C. § 1028A(a)(1) (2006).

¹² 129 S. Ct. at 1889.

¹³ *Id.*

¹⁴ *Id.* at 1888–89.

¹⁵ *Id.* at 1889.

¹⁶ *Id.*

¹⁷ 129 S. Ct. 1849, 1856 (2009).

¹⁸ 129 S. Ct. at 1894.

¹⁹ *Id.* at 1890.

²⁰ 129 S. Ct. at 1853 (“Congress’s use of the passive voice further indicates that subsection (iii) does not require proof of intent.”).

²¹ *Id.* (assigning weight to the fact that the text “does not require that the discharge be done knowingly or intentionally, or otherwise contain words of limitation”).

statute-specific analysis of the element's function.²² Only as an afterthought did the Court in *Dean* say anything about criminal law doctrine. And what it said, ultimately, was that the doctrinal principle invoked by Dean—the “presumption that criminal prohibitions include a requirement that the [g]overnment prove the defendant intended the conduct made criminal”—was not implicated.²³

The Court's neglect of the criminal law in these cases cannot be ascribed to a dearth of relevant criminal law doctrine. Legislatures routinely fail to specify the mental states associated with objective elements, and so the question whether a particular element requires a mental state routinely falls to the courts.²⁴ In resolving this question, courts traditionally have drawn on a rich—if somewhat untidy—body of “background principles,”²⁵ whose primary function is to distinguish elements that require mental states from elements that don't.²⁶ Some courts, for example, have made use of a distinction between elements that define the “proscribed act” and elements that define “additional consequence[s].”²⁷ Some

²² *Id.* (arguing that the discharge element, because it concerns “whether something happened—not how or why it happened,” is non-causal and requires no mental state).

²³ *Id.* at 1855.

²⁴ See Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 477 (1996) (“Congress is notoriously careless about defining the mental state element of criminal offenses.”).

²⁵ See *United States v. Figueroa*, 165 F.3d 111, 119 (2d Cir. 1998) (Sotomayor, J.) (identifying distinction between objective elements that make conduct criminal and objective elements that make criminal conduct worse as one of the “background principles that operate in the criminal law”).

²⁶ The Model Penal Code famously takes the view that every objective element in every criminal statute requires an associated mental state. See MODEL PENAL CODE § 2.02(1) (1985). Even in those states whose criminal codes most closely track the Model Penal Code, however, courts have proven reluctant to enforce this view. See, e.g., *Bell v. State*, 668 P.2d 829, 835 (Alaska Ct. App. 1983) (holding that no culpable mental state attaches to the age element in statute defining offense of aggravated prostitution); *People v. Mitchell*, 571 N.E.2d 701, 704 (N.Y. 1991) (holding that no culpable mental state attaches to the value element in statute defining the crime of aggravated theft); *State v. Rutley*, 171 P.3d 361, 366 (Or. 2007) (holding that no culpable mental state attaches to the distance element in Oregon statute prohibiting the delivery of a controlled substance within 1,000 feet of a school). The courts' reluctance is understandable, moreover, at least where so-called “general-intent offenses” are concerned. See Eric A. Johnson, *Mens Rea for Sexual Abuse: The Case for Defining the Acceptable Risk*, 99 J. CRIM. L. & CRIMINOLOGY 1, 11–20 (2009). In any event, this paper will suppose, as courts do, that some elements require mental states and some do not.

²⁷ See, e.g., *People v. Hood*, 462 P.2d 370, 378 (Cal. 1969). In substance, the “proscribed act” encompasses every objective element that falls short of the ultimate harm at which the statute is targeted. See, e.g., *People v. Overman*, 24 Cal. Rptr. 3d 798, 805 (Cal. Ct. App. 2005) (holding that the discharge element in a statute prohibiting the negligent discharge of a firearm is part of the proscribed act, rather than an additional consequence). In contrast, an element will count as an “additional consequence” if it measures the social harm at which the statute is targeted. See, e.g., *People v. Hesslink*, 213 Cal. Rptr. 465, 470–71 (Cal. Ct. App. 1985) (holding that the element of “obtain[ing] property of another” in extortion statute qualified as an “additional consequence”). Courts have made use of this distinction—and of the derivative distinction between general-intent and specific-intent crimes—in deciding whether particular elements require mental states. See, e.g., *United States v. Zunie*, 444 F.3d 1230, 1233–35 (10th Cir. 2006) (reasoning that because crime of

courts have made use of a distinction between elements that make conduct criminal, and elements that make criminal conduct more serious.²⁸ And some courts have made use of the Model Penal Code's threefold division of elements into conduct, results, and attendant circumstances.²⁹ In all of these distinctions among objective elements, the courts have found guidance in resolving the question that the Court faced in *Dean* and *Flores-Figueroa*—namely, what mental state, if any, a particular element requires.

Nor can the Court's failure to look to the criminal law for help be attributed, in either *Dean* or *Flores-Figueroa*, to the availability of clear guidance in the statutory text itself. True, "[t]here are certainly cases in which grammar and punctuation suggest a clear answer to a question of [criminal] statutory interpretation."³⁰ And so there are criminal cases where resort to criminal law background principles is simply unnecessary. But neither *Dean* nor *Flores-Figueroa* was such a case. In both cases, the statutes contained just the kinds of ambiguities—silence about mens rea, in *Dean*, and uncertain adverbial scope, in *Flores-Figueroa*—that courts traditionally have treated as an invitation to resort to criminal law background principles for guidance.³¹

In both cases, the Court's emphasis on the statutory text, rather than on criminal law background principles, was really the product of an unstated choice between two starkly different approaches to statutory interpretation. The first approach, in Jeremy Waldron's words, "[makes] doctrinal systematicity the point

"assault resulting in serious bodily injury is a general intent" offense, it does not require proof that defendant actually intended to cause serious bodily injury); *Seymore v. State*, 152 P.3d 401, 406 (Wyo. 2007) (reasoning that because "escape is a general intent crime," it does not require a mental state with respect to the ultimate harm at which the statute is targeted, namely, the evasion of justice). For a general discussion of this troublesome distinction, see Eric A. Johnson, *Making Sense of General and Specific Intent: Eight Things I Know for Sure* (Sept. 11, 2008) (unpublished manuscript) (on file with author).

²⁸ See, e.g., *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72–73 (1994) (holding that presumption of scienter applies "to each of the statutory elements that criminalize otherwise innocent conduct" and identifying "the age of the performers" in child pornography statute as an "element separating legal innocence from wrongful conduct"); *United States v. Taylor*, 239 F.3d 994, 997 (9th Cir. 2001) (holding that no mental state need be proved with respect to the age element in statute that prohibits transporting minors across state lines for prostitution, since "the age of the victim simply subjects the defendant to a more severe penalty").

²⁹ See, e.g., *People v. Douglas*, 886 N.E.2d 1232, 1237–38 (Ill. App. Ct. 2008) (distinguishing "voluntary act," which "must be accompanied by a culpable mental state," from crime's "attendant circumstances," which "do not require a mental state," in holding that "the age of the accused and the age of the victim [in Illinois's sexual-assault statute] are attendant circumstances that do not require an associated mental state"); *State v. Walker*, 915 P.2d 1039, 1042 (Or. Ct. App. 1996) (holding that, in prosecution for delivering a controlled substance within 1000 feet of a school, the state was not required to prove a culpable mental state with respect to the distance element, since "the location of the offense . . . [was] not an act, but an attendant circumstance of the underlying criminal conduct of delivery of a controlled substance").

³⁰ *Figueroa*, 165 F.3d at 115.

³¹ See *infra* text accompanying notes 128 to 152.

of reference for judicial reasoning.”³² This approach is at work when courts invoke substantive, criminal law background principles to resolve the question what mental state, if any, a particular element requires. The second, alternative approach, again in Waldron’s words, focuses not on relevant doctrine, but on “the text of the latest piece of legislation.”³³ This approach was at work in *Dean* and *Flores-Figueroa*, where—for all the help it got from the criminal law—the Court might as well have been interpreting statutes about retirement benefits or environmental protection. Moreover, the Court’s choice of the second approach in *Dean* and *Flores-Figueroa*, if unstated, does not appear to have been unconsidered. In *Flores-Figueroa* in particular, the Court went beyond mere neglect of doctrine to active disparagement. It dismissed as a “legal cliché”³⁴ the background principle that “ignorance of the law is no excuse,”³⁵ for example. And it misrepresented two of its own past decisions as triumphs of plain meaning over background principles.³⁶

My primary aim in this paper will be to make explicit the choice behind the Court’s analyses in *Dean* and *Flores-Figueroa*. For comparison’s sake, I will begin by describing the traditional, doctrine-centered approach to criminal statutory interpretation. This approach has a long history,³⁷ but nowhere is better illustrated than in Justice (then Judge) Sotomayor’s first opinion as a judge of the Second Circuit Court of Appeals: *United States v. Figueroa*.³⁸ In *Figueroa*, as in *Dean* and *Flores-Figueroa*, the question was what mental state, if any, was attached to a particular element.³⁹ In answering this question, though, Justice Sotomayor refused to rely either on the statute’s grammar or on its legislative history. Writing for a unanimous three-judge panel, she said she preferred to rely on “[t]he principles of construction underlying the criminal law.”⁴⁰

The first part of this paper, then, will use Justice Sotomayor’s opinion for the Second Circuit in *Figueroa* as a vehicle for exploring the traditional, doctrine-centered approach to criminal statutory interpretation. The second part of this paper will show where the Supreme Court’s decisions in *Dean* and *Flores-Figueroa* depart from this traditional approach.

Finally, in the third part of this paper, I will argue very briefly that both *Dean* and *Flores-Figueroa* illustrate shortcomings in the non-doctrinal, text-

³² Jeremy Waldron, “Transcendental Nonsense” and System in the Law, 100 COLUM. L. REV. 16, 36 (2000).

³³ *Id.* at 37.

³⁴ *Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1891 (2009).

³⁵ *Id.*

³⁶ See *id.* (discussing *Liparota v. United States*, 417 U.S. 419 (1985), and *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994)).

³⁷ See, e.g., *Morrisette v. United States*, 342 U.S. 246, 250–63 (1952).

³⁸ 165 F.3d 111 (2d Cir. 1998).

³⁹ *Id.* at 113–14.

⁴⁰ *Id.* at 119.

centered approach to criminal statutory interpretation. First, I will argue that even the statute at issue in *Flores-Figueroa* belies the Court's insistence, in *Flores-Figueroa* itself, that resort to background principles is necessary only in "special contexts."⁴¹ Second, I will argue that the Court's analysis in *Dean* of the "discharge" element in 18 U.S.C. § 924(c)(1)(A) founders precisely because the Court ignores the relevant doctrinal background. This paper will not, however, offer anything like a comprehensive defense of the doctrine-centered approach to criminal statutory interpretation, nor will it develop a systematic account of existing criminal law background principles. Both of these are topics for other papers.

II. THE DOCTRINE-CENTERED APPROACH: *UNITED STATES V. FIGUEROA*

The doctrine-centered approach to criminal statutory interpretation has two defining characteristics. The first is the courts' readiness, under this approach, to conclude that the statute itself leaves important questions unanswered. The second is the courts' assumption that these unanswered questions are best resolved by the systematic application of criminal law doctrine—rather than by, say, an ad hoc, statute-specific analysis of the policies at stake. In this section, I will treat these two facets of the doctrine-centered approach in order.

A. Readiness to Treat Criminal Statutes as Incomplete

The first defining characteristic of the doctrine-centered approach could be described as a readiness to treat criminal statutes as "half-formed."⁴² In a particular case, the perceived incompleteness of the statute might be attributable to ambiguity, or it might be attributable to vagueness or what philosophers call "open texture."⁴³ But the critical thing is that the statute's text is thought, unproblematically, to leave important questions unanswered. Justice Sotomayor's opinion for the Second Circuit in *United States v. Figueroa*⁴⁴ illustrates this readiness to treat criminal statutes as incomplete.

⁴¹ *Flores-Figueroa*, 129 S. Ct. at 1891.

⁴² Dan M. Kahan, *Ignorance of Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 153 (1997) [hereinafter Kahan, *Ignorance of Law*] ("[T]he truth . . . is that criminal statutes typically emerge from the legislature only half-formed and must be completed through contentious, norm-laden modes of interpretation that are functionally indistinguishable from common-law making."); see also Kahan, *supra* note 24, at 470 (arguing that "judicial invention" in the interpretation of federal criminal statutes "does not reflect a lawless usurpation of legislative prerogative; rather, it is a response to the deliberate incompleteness of the criminal statutes that Congress enacts"); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2469 (2003) (acknowledging that criminal statutes sometimes "do[] not spell out every detail").

⁴³ See Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 181–88, 193–202 (1981) (explaining the differences between ambiguity, vagueness, and open texture).

⁴⁴ 165 F.3d 111 (2d Cir. 1998).

The statute at issue in *Figueroa* was 8 U.S.C. § 1327, which then applied to “[a]ny person who knowingly aids or assists any alien excludable under [8 U.S.C. §] 1182(a)(2) (insofar as an alien excludable under such section has been convicted of an aggravated felony) . . . to enter the United States.”⁴⁵ The defendant in the case, Figueroa, was an inspector for the Immigration and Naturalization Service who had helped an alien, Garcia, to enter the country illegally.⁴⁶ There was no doubt that Garcia was excludable under § 1182(a)(2) by virtue of a prior aggravated felony conviction—he had served three years for kidnapping.⁴⁷ Nor does there appear to have been any real doubt that Figueroa knew that Garcia was excludable.⁴⁸ But the evidence did not suggest that Figueroa knew why Garcia was excludable.⁴⁹ And so the question arose whether the statutory mental state, “knowingly,” extended to the reason why the alien was excludable.⁵⁰ Figueroa argued that it did; he argued that the government “should have been required to [show] that he knew Garcia was excludable because of his prior aggravated felony conviction.”⁵¹ The government argued that no mental state attached to the reason why Garcia was excludable.⁵²

On appeal to the Second Circuit, Figueroa urged the court to resolve the interpretive question on the basis of the mental-state adverb’s position within the statute.⁵³ He argued that “the English language”⁵⁴ and its rules of “accepted sentence structure”⁵⁵ required that the word “‘knowingly’ . . . be read to modify all the elements of the crime, including the precise nature of the alien’s excludable status.”⁵⁶ He argued, in other words, that his interpretation “comport[ed] with the ‘most natural grammatical reading’ of the statute.”⁵⁷

But Justice Sotomayor rejected Figueroa’s grammatical argument. “In the case of statutes like this,” she said, “where a mental state adverb can modify some or all of the remaining words in a sentence, neither grammar nor punctuation resolves the question of how much knowledge Congress intended to be sufficient

⁴⁵ 8 U.S.C. § 1327 (1994) (amended 1996); see also *Figueroa*, 165 F.3d at 114 & n.2 (reciting the then-applicable statute and describing reason for amendment to the statute).

⁴⁶ *Figueroa*, 165 F.3d at 113.

⁴⁷ *Id.*

⁴⁸ See *id.* (describing Figueroa’s signals to, and lack of substantive questioning of, Garcia).

⁴⁹ *Id.*

⁵⁰ See *id.* at 114.

⁵¹ *Id.* at 113.

⁵² *Id.* at 116.

⁵³ *Id.* at 115.

⁵⁴ Reply Brief for Appellant Ancelmo Figueroa at 1, *Figueroa*, 165 F.3d 111 (No. 98-1111).

⁵⁵ *Id.* at 2 (arguing that the government, “[i]n urging that ‘knowingly’ modifies only part of the phrase which it heads ‘aids and assisting any alien excludable under Section 1182(a)(2)[,]’ does violence to accepted sentence structure”).

⁵⁶ *Figueroa*, 165 F.3d at 115.

⁵⁷ *Id.* (citation omitted).

for a conviction.”⁵⁸ Why not? Part of the reason, no doubt, is that statutes like these often are genuinely ambiguous as a matter of English grammar.⁵⁹ On this point, Justice Sotomayor quoted Professor Wayne LaFave, who said of a similar statute that, “[a]s a matter of grammar the statute is ambiguous; it is not at all clear how far down the sentence the word ‘knowingly’ is intended to travel.”⁶⁰

But there is more than grammatical ambiguity behind the courts’ readiness—under the doctrine-centered approach—to treat the scope of mental-state adverbs as indeterminate. In *Figueroa*, Justice Sotomayor acknowledged, parenthetically, that mental-state adverbs sometimes are treated as indeterminate even when the statute’s grammar, punctuation, or structure appears to define the adverb’s scope.⁶¹ She quoted the Second Circuit’s 1991 decision in *United States v. Morris*⁶² for the proposition that “with many statutes, a mental state adverb adjacent to initial words has been applied to phrases or clauses appearing later in the statute without regard to the punctuation or structure of the statute.”⁶³

Just how far courts will go in ignoring grammatical and structural cues is illustrated by the Supreme Court’s 1994 decision in *United States v. X-Citement Video, Inc.*⁶⁴ In *X-Citement Video*, as in *Figueroa*, the question was how far down the sentence the mental-state adverb “knowingly” was meant to travel.⁶⁵ In *X-Citement Video*, though, the statute’s text appeared to answer this question. The statute, which prohibited the interstate transportation or shipment of child pornography, provided, in relevant part:

(a) Any person who—

(1) knowingly transports or ships in interstate commerce or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

⁵⁸ *Figueroa*, 165 F.3d at 115.

⁵⁹ See Richmond H. Thomason & Robert C. Stalnaker, *A Semantic Theory of Adverbs*, 4 LINGUISTIC INQUIRY 195, 217 (1973) (explaining why “[w]ord order in English is not in general a very reliable clue to adverbial scope”).

⁶⁰ *Figueroa*, 165 F.3d at 115 n.6 (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., HANDBOOK ON CRIMINAL LAW § 27, at 193 (1972)); see also Kahan, *supra* note 24 (“When [Congress] does address the issue [of mens rea], it often speaks ambiguously, failing to specify, for example, which clauses in a long and convoluted string are modified by the term ‘knowingly.’”).

⁶¹ *Figueroa*, 165 F.3d at 115.

⁶² 928 F.2d 504 (2d Cir. 1991).

⁶³ *Figueroa*, 165 F.3d at 115 (quoting *Morris*, 928 F.2d at 507).

⁶⁴ 513 U.S. 64 (1994).

⁶⁵ *Id.* at 68.

....

... shall be punished as provided in subsection (b) of this section.⁶⁶

The Court acknowledged, rightly, that “[t]he most natural grammatical reading [of this statute] . . . suggests that the term ‘knowingly’ modifies only the surrounding verbs.”⁶⁷ The Court also acknowledged that “[u]nder this construction, the word ‘knowingly’ would not modify the elements of the minority of the performers, or the sexually explicit nature of the material, because they are set forth in independent clauses separated by interruptive punctuation.”⁶⁸ But the Court read the word “knowingly” to modify these elements anyway. The Court said that when the statute was read against the backdrop of criminal law convention, the “plain language reading of [18 U.S.C.] § 2252 is not so plain” after all.⁶⁹ In short, the Court proved ready to treat this seemingly unambiguous statute as ambiguous; it proved ready to treat the adverb’s scope as indeterminate.

Courts have proven equally ready to treat criminal statutes as incomplete where the statute fails to specify any mental state at all. Ordinarily, a statute’s omission of any reference to a particular fact or element would be treated as unambiguous; the courts, after all, “ordinarily resist reading words or elements into a statute that do not appear on its face.”⁷⁰ But a statute that is silent about mens rea usually is treated, under the doctrine-centered approach, simply as leaving the question of mens rea unanswered. It has been settled at least since the Court’s 1952 decision in *Morissette v. United States*⁷¹ “that mere omission from [a criminal statute] of any mention of intent will not be construed as eliminating that element from the crimes denounced.”⁷² Thus, where a statute is silent about the mental state associated with a particular element, the answer to the mens rea question must come from somewhere else—from an analysis of “the nature of the statute,”⁷³ perhaps, or from “the background rules of the common law.”⁷⁴

This is not to say, of course, that the doctrine-centered approach forecloses the possibility that the words of the statute will carry clear answers to questions of criminal statutory interpretation. In *Figueroa*, Justice Sotomayor acknowledged

⁶⁶ 18 U.S.C. § 2252 (1988 & Supp. V 1993).

⁶⁷ *X-Citement Video*, 513 U.S. at 68.

⁶⁸ *Id.*

⁶⁹ *Id.* at 71.

⁷⁰ *Bates v. United States*, 522 U.S. 23, 29 (1997) (declining to interpret criminal statute to require a specific “intent to defraud”).

⁷¹ 342 U.S. 246 (1952).

⁷² *Id.* at 263; see also *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978) (holding that “far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement”).

⁷³ *Staples v. United States*, 511 U.S. 600, 607 (1994).

⁷⁴ *Id.* at 605.

that “[t]here are certainly cases in which grammar and punctuation suggest a clear answer to a question of statutory interpretation.”⁷⁵ And in *Morissette*, the Supreme Court acknowledged that even the criminal law’s strong presumption against strict liability “would not justify judicial disregard of a clear command [dispensing with mens rea] from Congress.”⁷⁶ The courts’ readiness to treat criminal statutes as incomplete is a matter of degree, but no less real for that.

B. *The Resort to Doctrine*

The second defining feature of the doctrine-centered approach is the courts’ assumption that questions left unanswered by the statute’s text usually are best resolved by the systematic application of criminal law doctrine—rather than by, say, an ad hoc, statute-specific analysis of the policies at stake.⁷⁷

Justice Sotomayor’s opinion in *United States v. Figueroa* illustrates this turn to doctrine. Immediately after rejecting Figueroa’s textual argument—and so concluding that the text was ambiguous—Justice Sotomayor said that “courts often discern congressional intent by reading the text in light of the legal principles that operate in the relevant area of the law.”⁷⁸ For this proposition, she relied on *United States v. United States Gypsum Co.*,⁷⁹ where the Supreme Court had said that “Congress will be presumed to have legislated against the background of our traditional legal concepts.”⁸⁰ Justice Sotomayor would return to this same theme again later, when she rejected Figueroa’s appeal to the statute’s ambiguous legislative history.⁸¹ “The principles of construction underlying the criminal law,” she said, “serve as much better signposts to congressional intent in these kinds of circumstances than a statute’s sparse and inconsistent legislative history.”⁸² In other words, the best guide to congressional intent is “the background principles that operate in the criminal law.”⁸³

The remainder of the opinion is devoted to the careful development of these background principles. In particular, Justice Sotomayor articulated a distinction between two kinds of objective elements: (1) elements that “separat[e] legal innocence from wrongful conduct” and (2) elements that separate wrongful

⁷⁵ *United States v. Figueroa*, 165 F.3d 111, 115 (2d Cir. 1998).

⁷⁶ *Morissette*, 342 U.S. at 254 n.14.

⁷⁷ Cf. *Brogan v. United States*, 522 U.S. 398, 406 (1998) (Scalia, J.) (acknowledging difference between (1) the application of “well defined (or even newly enunciated), generally applicable, [criminal law] background principles of assumed legislative intent” and (2) the creation of “case-by-case exceptions” to “criminal statutes”).

⁷⁸ *Figueroa*, 165 F.3d at 115.

⁷⁹ 438 U.S. 422 (1978).

⁸⁰ *Figueroa*, 165 F.3d at 115 (quoting *U. S. Gypsum Co.*, 438 U.S. at 437).

⁸¹ *Id.* at 119.

⁸² *Id.*

⁸³ *Id.*

conduct from worse conduct.⁸⁴ She used this distinction to define the limits of the traditional presumption against strict liability.⁸⁵ “Absent clear congressional intent to the contrary,” she said, “statutes defining federal crimes are . . . normally read to contain a mens rea requirement that attaches to enough elements of the crime that together would be sufficient to constitute an act in violation of the law.”⁸⁶ In other words, the presumption against strict liability usually requires that a mental state be assigned to elements “that make [the] conduct illegal,”⁸⁷ but does not require that a mental state be assigned to elements that make the conduct a worse crime. In *Figueroa* itself, the critical element—the excludable alien’s prior felony conviction—just made the defendant’s crime worse, so the element required no culpable mental state.⁸⁸

This distinction—between elements that make the conduct illegal and elements that make the crime worse—was not novel even in 1998. The Supreme Court had hinted before at the same distinction in *Staples v. United States*,⁸⁹ for example, where it said that the presumption against strict liability requires the government to prove some mental state with respect to all “the facts that make [the] conduct illegal.”⁹⁰ In *United States v. X-Citement Video, Inc.*,⁹¹ too, the Court said that the presumption against strict liability applies only to “elements that criminalize otherwise innocent conduct.”⁹² What is unique about *Figueroa* is the

⁸⁴ *Id.* at 117 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994)).

⁸⁵ See *United States v. Taylor*, 937 F.2d 676, 681 (D.C. Cir. 1991) (quoting *United States v. Nofziger*, 878 F.2d 442, 452 (D.C. Cir. 1989)) (“[T]he presumption against strict liability states that ‘absent evidence of a contrary legislative intent, courts should presume *mens rea* is required.’”).

⁸⁶ *Figueroa*, 165 F.3d at 116.

⁸⁷ *Staples v. United States*, 511 U.S. 600, 605 (1994); see also *United States v. Crimmins*, 123 F.2d 271, 272 (2d Cir. 1941) (L. Hand, J.) (distinguishing general-intent offenses, which require proof that the defendant was “aware of the existence of all those facts which make his conduct criminal,” from strict-liability offenses, which do not).

⁸⁸ *Figueroa*, 165 F.3d at 118. It is possible to quarrel with Justice Sotomayor’s application of this limitation on the presumption of scienter. In *Figueroa*, the critical distinction—between elements that make conduct criminal and elements that make criminal conduct more serious—does not function merely as a limitation on the presumption of scienter. Rather, it functions as the trigger of a reverse presumption, in which aggravating elements are presumed not to require mental states. This reverse presumption is probably indefensible.

⁸⁹ 511 U.S. 600 (1994).

⁹⁰ *Id.* at 619; *id.* at 618–19 (“[W]here . . . dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct,” and Congress has attached a severe penalty to a crime, “the usual presumption that a defendant must know the facts that make his conduct illegal should apply.”).

⁹¹ 513 U.S. 64 (1994).

⁹² *Id.* at 72. The Court eventually would speak more clearly on this question in *Carter v. United States*, 530 U.S. 255 (2000), where it said that “[t]he presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’” *Id.* at 269 (quoting *X-Citement Video*, 513 U.S. at 72). The Supreme Court’s announcements on this score remain sufficiently opaque, though, as to permit the editors of the *Harvard Law Review* to characterize the distinction “between innocent and non-innocent

degree of rigor Justice Sotomayor brought to the articulation of this distinction. She first traced this distinction through a series of Supreme Court decisions, then traced the same distinction through the decisions of the federal courts of appeals before finally applying it to the statute at issue in *Figueroa*'s case.⁹³ The focus throughout the opinion is on the articulation of doctrinal principles.

Almost as telling as what Justice Sotomayor said in *Figueroa* is what she didn't say. What she didn't say was much of anything about the specific purposes of the statute at issue in *Figueroa*'s case, 8 U.S.C. § 1327, or about the practical implications of the interpretation urged upon the court by *Figueroa*. She did not say, for example—though she reasonably could have—that requiring the government to prove the actor's knowledge of the alien's aggravated felony conviction would make the statute practically unenforceable. Nor did she speculate about why, exactly, a person who unlawfully helps a felon enter the country (in violation of § 1327) should be subject to greater punishment than a person who unlawfully helps an otherwise excludable alien enter the country (in violation of 8 U.S.C. § 1324). Her only detour into specifics was when she said that § 1327 “generates incentives for [persons who unlawfully help aliens to enter the country] to find out whether they are assisting an alien felon into the country and to avoid aiding aliens in this narrow class.”⁹⁴ But this detour was followed, in the very next sentence, by a reminder that her conclusions about the statute really “were derived from presumptions inherent in the criminal law.”⁹⁵

Why, then, does Justice Sotomayor suppose that the generalities of criminal law doctrine—or “the background principles [of] the criminal law,”⁹⁶ as she puts it—provide a surer guide to congressional intent than does the grammar of the statute, or the statute's specific purposes? One possible answer—the textualist's answer, presumably—would be that the criminal law's background principles provide a kind of codebook for “decoding” the statute's text.⁹⁷ On this view, the text of the statute does have a determinate meaning. This determinate meaning, though, can be ascertained only through the application of “prevailing interpretive conventions”⁹⁸ like the presumption against strict liability. Thus, Professor John Manning has argued that “textualists read mens rea requirements into otherwise

underlying conduct” as a product of the lower courts' misinterpretation of Supreme Court precedent. *The Supreme Court 2008 Term—Leading Cases*, 123 HARV. L. REV. 153, 319–20 (2009).

⁹³ *Figueroa*, 165 F.3d at 115–18.

⁹⁴ *Id.* at 119.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 432–33 (2005) (arguing that “the demands of legislative supremacy require only that legislators intend to enact a law that will be decoded according to prevailing interpretive conventions”).

⁹⁸ *Id.*

unqualified criminal statutes because established judicial practice calls for interpreting such statutes in light of common law mental state requirements.”⁹⁹

Whatever the virtues of this account, it does not track what Justice Sotomayor actually did in *Figueroa*, or for that matter what courts do generally in similar cases.¹⁰⁰ The statute interpreted in *Figueroa*, 8 U.S.C. § 1327, was adopted in 1952, and then amended in 1988 and 1990.¹⁰¹ But Justice Sotomayor made no effort to ascertain what the “prevailing interpretive conventions” were as of any of those dates. Rather, her articulation of the relevant background principles—and in particular of the distinction between elements that make conduct criminal and elements that make criminal conduct worse—was based almost entirely on case law from after 1990. She relied heavily on *Staples v. United States*¹⁰² and *United States v. X-Citement Video, Inc.*,¹⁰³ both of which were decided by the Supreme Court in 1994.¹⁰⁴ And she relied, too, on a 1994 decision of the Second Circuit¹⁰⁵ and on a 1996 decision of the Fourth Circuit.¹⁰⁶ She was not, then, trying to determine what the words of the statute’s text would have meant in 1952 or 1990 to “a reasonable person, conversant with the applicable conventions.”¹⁰⁷

What Justice Sotomayor actually did in *Figueroa* might be better described as an exercise of “delegated common law-making” authority.¹⁰⁸ Professor Dan Kahan has argued that Congress, by “enacting incompletely specified criminal statutes . . . implicitly transfer[s] lawmaking authority to the judiciary.”¹⁰⁹ “[C]riminal statutes typically emerge from the legislature only half-formed,”¹¹⁰ and so the courts bear the responsibility for “formulating the mediating principles and

⁹⁹ Manning, *supra* note 42, at 2466.

¹⁰⁰ See *Brogan v. United States*, 522 U.S. 398, 406 (1998) (Scalia, J.) (acknowledging that the interpretation of criminal statutes sometimes is guided by “background interpretive principle[s] of general application” even where those principles are “newly enunciated”).

¹⁰¹ See Immigration and Nationality Act, Pub. L. No. 82-414, § 277, 66 Stat. 163, 229-30 (1952); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7346, 102 Stat. 4181, 4471 (1988); Immigration Act of 1990, Pub. L. No. 101-649, §§ 543(b)(4), 603(a)(16), 104 Stat. 4978, 5059, 5084 (1990); see also 8 U.S.C. § 1327 (1994).

¹⁰² 511 U.S. 600 (1994).

¹⁰³ 513 U.S. 64 (1994).

¹⁰⁴ See *United States v. Figueroa*, 165 F.3d 111, 115-18 (2d Cir. 1998).

¹⁰⁵ *Id.* at 117-18 (discussing *United States v. LaPorta*, 46 F.3d 152 (2d Cir. 1994)).

¹⁰⁶ *Id.* at 118 (discussing *United States v. Cook*, 76 F.3d 596 (4th Cir. 1996)).

¹⁰⁷ Manning, *supra* note 97, at 434.

¹⁰⁸ Kahan, *supra* note 24, at 470 (arguing that “federal criminal law, as a whole, is best conceptualized as a regime of delegated common law-making”).

¹⁰⁹ Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 372 [hereinafter Kahan, *Crimes*]; see also Kahan, *supra* note 24, at 470 (arguing that “judicial invention” in the interpretation of federal criminal statutes “is a response to the deliberate incompleteness of the criminal statutes”).

¹¹⁰ Kahan, *Ignorance of Law*, *supra* note 42, at 153.

doctrines necessary to bring these statutes to bear on real-world facts.”¹¹¹ In making the case for this account of criminal statutory interpretation, Professor Kahan focuses primarily on the criminal law’s special part. He argues, for example, that courts have “filled out the [federal] mail fraud statute by devising a cluster of special rules on the nexus between the scheme to defraud and the mailing,”¹¹² and that the courts, in implementing the Racketeer Influenced Corrupt Organizations Act, have “devised an elaborate set of doctrinal tests and definitions.”¹¹³

But courts exercise the same law-making power with respect to the criminal law’s general part. Consider, for example, how the courts implement the requirement of causation. The requirement of causation is statutory, of course; homicide statutes, for example, typically require the government to prove that the actor “caused” the victim’s death.¹¹⁴ But few criminal codes define the required causal relationship.¹¹⁵ Rather, the law defining the required relationship is essentially “left to judicial development.”¹¹⁶ This is not to say that every result-based criminal statute operates as a specific delegation of law-making authority. (Courts, after all, do not ordinarily develop statute-specific definitions of causation.¹¹⁷) Nor is it to say, however, that the legislature, in enacting a result-based criminal statute, incorporates the judge-made law of causation as it existed when the statute was enacted. The truth lies somewhere in between. Statutes that make use of the concept of causation are linked, as it were, to an ever-changing body of judge-made law on the subject of causation.

The same is true where the assignment of mental states is concerned. That is, where the assignment of mental states is concerned, criminal statutes are linked to a separate body of law that answers questions left unanswered by the statute itself. How this works is nicely illustrated by the Model Penal Code, whose

¹¹¹ Kahan, *Crimes*, *supra* note 109, at 372–73.

¹¹² *Id.* at 376.

¹¹³ *Id.* at 381.

¹¹⁴ See, e.g., N.Y. PENAL LAW § 125.25(1) (McKinney 2009) (providing that the actor commits second-degree murder when, “[w]ith intent to cause the death of another person, he causes the death of such person or of a third person”).

¹¹⁵ See MODEL PENAL CODE § 2.03 cmt. 5 (1985) (observing that “[i]n the majority of the jurisdictions that have adopted or considered revised codes, no explicit provision on causation has been included”).

¹¹⁶ *Id.* (describing likely effect of causation provision included in draft federal criminal code); see also *State v. David*, 141 P.3d 646, 649–52 (Wash. Ct. App. 2006) (recognizing that the Washington Legislature “has historically left to the judiciary the task of defining some criminal elements,” among them causation).

¹¹⁷ See, e.g., *David*, 141 P.3d at 651 (holding that reference to “proximate causation” in Washington state’s vehicular homicide statute should be interpreted in keeping with generally applicable judge-made law on the subject of proximate cause). For an interesting counterexample, see *People v. Schaefer*, 703 N.W.2d 774, 784 (Mich. 2005), where the Michigan Supreme Court held that the state’s drunk-driving homicide statute did not require a causal nexus between the defendant’s intoxication and the victim’s death.

separate body of interpretive rules tells the courts what mental states to assign to the objective elements of crimes.¹¹⁸ Subsection 2.02(4), for example, tells courts how to resolve ambiguities in the scope of mental-state adverbs—namely, by applying the mental state “to all the material elements of the offense, unless a contrary purpose plainly appears.”¹¹⁹ And subsection 2.02(3) tells courts what mental state to assign to elements for which no mental state is prescribed by the statute defining the offense—namely, the mental state of recklessness.¹²⁰

Congress declined, as did most state legislatures, to adopt counterparts to Model Penal Code § 2.02.¹²¹ But here, as with causation, the effect of Congress’s inaction is merely that the relevant principles are “left to judicial development.”¹²² There is no reason to suppose that Congress meant to forestall the judicial development of a separate body of interpretive rules, and many reasons to suppose that it did not. For one thing, the relationship of a criminal statute’s mental states to its objective elements is complex—too complex, probably, to be specified exhaustively in every statute.¹²³ For another, Congress can hardly have meant for the courts to glean the required information from the statute’s legislative history, “which all too frequently proves elusive on the issue.”¹²⁴ The better view, then, is that there is a separate body of interpretive rules—judge-made, and therefore subject to development over time—that answers the inevitable questions about the assignment of mental states to elements. The application of this separate body of interpretive rules sometimes is, paradoxically, a better guide to “congressional intent” than is the statute’s text or legislative history.¹²⁵

III. THE STATUTE-SPECIFIC APPROACH: *FLORES-FIGUEROA V. UNITED STATES* AND *DEAN V. UNITED STATES*

For the sake of comparison, the Supreme Court’s current approach to criminal statutory interpretation, as reflected in *Flores-Figueroa v. United States*¹²⁶

¹¹⁸ See MODEL PENAL CODE § 2.02(1), (3), (4), (9) (1985).

¹¹⁹ *Id.* § 2.02(4).

¹²⁰ *Id.* § 2.02(3).

¹²¹ See S. COMM. ON THE JUDICIARY, 94TH CONG., CRIMINAL JUSTICE REFORM ACT OF 1975, at 58–61 (Comm. Print 1975) (explaining provisions of proposed federal criminal code (ultimately rejected) that would have controlled the interpretation of federal statutes with respect to mens rea).

¹²² MODEL PENAL CODE § 2.03 cmt. 5 (1985) (describing effect of provision included in draft federal criminal code).

¹²³ See *infra* Part IV.A. (arguing that the Supreme Court in *Flores-Figueroa* underestimated the complexity of the relationship between a statute’s mental states and its objective elements).

¹²⁴ See S. COMM. ON THE JUDICIARY, 94TH CONG., CRIMINAL JUSTICE REFORM ACT OF 1975, at 58 (Comm. Print 1975).

¹²⁵ See *United States v. Figueroa*, 165 F.3d 111, 119 (2d Cir. 1998) (arguing that criminal law doctrine sometimes provides “better signposts to congressional intent” than does a statute’s legislative history).

¹²⁶ 129 S. Ct. 1886 (2009).

and *Dean v. United States*,¹²⁷ also can be thought of as having two defining characteristics. The first is a readiness to find clear answers to interpretive questions in the statute's text. The second is a preference for resolving unanswered questions without the help of criminal law doctrine.

A. Readiness to Find Clear Meaning in the Text

Both in *Dean* and in *Flores-Figueroa*, the Supreme Court found clear guidance in aspects of the statute's text that would traditionally, under the doctrine-centered approach to interpretation, have been treated as ambiguous. In *Dean*, the Court found guidance in the statute's omission of a mental state.¹²⁸ And in *Flores-Figueroa*, the Court found guidance in the positioning of the mental-state adverb in relation to the critical element.¹²⁹

The statute at issue in *Dean*, again, requires the government to prove that the defendant's firearm was discharged during a federal crime of violence or drug-trafficking crime.¹³⁰ The question in the case was what culpable mental state, if any, is associated with the discharge element.¹³¹ In concluding that the discharge element has no associated mental state, the Court relied in part on Congress's failure to specify a mental state. "[W]e ordinarily resist reading words or elements into a statute that do not appear on its face," the Court said.¹³²

This reference to the statute's silence was not followed, as once it might have been, by an acknowledgement that "far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement."¹³³ Nor was Congress's silence treated, as once it might have been, as an invitation to examine "the nature of the statute" and "construe the statute in light of the background rules of the common law."¹³⁴ In *Dean*, rather, Congress's silence was treated as an independent, stand-alone reason for concluding that no mental state was required.¹³⁵ After making the argument from Congress's silence, the Court simply turned to the next argument.¹³⁶

The text played an even more decisive role in *Flores-Figueroa*. The statute at issue in *Flores-Figueroa*, again, applies by its terms to an actor who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of

¹²⁷ 129 S. Ct. 1849 (2009).

¹²⁸ *Id.* at 1853.

¹²⁹ *Flores-Figueroa*, 129 S. Ct. at 1890–91.

¹³⁰ *Dean*, 129 S. Ct. at 1853 (referring to subsection (iii) of 18 U.S.C. § 924(c)(1)(A) (2006)).

¹³¹ *Id.*

¹³² *Id.* (quoting *Bates v. United States*, 522 U.S. 23, 29 (1997)).

¹³³ *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978).

¹³⁴ *Staples v. United States*, 511 U.S. 600, 605, 607 (1994).

¹³⁵ *See Dean*, 129 S. Ct. at 1853.

¹³⁶ *See id.*

another person.”¹³⁷ The question in the case was whether the “knowingly” mental state extended to the belonging element—to the fact that the means of identification belonged to a real person.¹³⁸ So the question was—like the question that faced Justice Sotomayor in *Figueroa*—a question about adverbial scope. The Supreme Court’s approach to resolving this question, though, could not have been more different from Justice Sotomayor’s.

In concluding that the “knowingly” mental state extends to the statute’s belonging element, the Court relied exclusively on “ordinary English grammar.”¹³⁹ “As a matter of ordinary English grammar,” the Court said, “it seems natural to read the statute’s word ‘knowingly’ as applying to all the subsequently listed elements of the crime.”¹⁴⁰ For this proposition, the Court relied not on other criminal law cases but on homely examples from everyday usage:

If a child knowingly takes a toy that belongs to his sibling, we assume that the child not only knows that he is taking something, but that he also knows that what he is taking is a toy *and* that the toy belongs to his sibling. If we say that someone knowingly ate a sandwich with cheese, we normally assume that the person knew both that he was eating a sandwich and that it contained cheese.¹⁴¹

From these and other examples, the Court distilled a heretofore unremarked rule of English usage: “In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence.”¹⁴² The Court’s argument really ends with the formulation of this rule. What remains of the opinion is just a series of afterthoughts, most of them responses to government arguments.

In the first of these afterthoughts, the Court defended its account of English usage as consistent with “[t]he manner in which the courts ordinarily interpret criminal statutes.”¹⁴³ The Court mentioned two of its own decisions in particular—*United States v. X-Citement Video, Inc.*¹⁴⁴ and *Liparota v. United States*¹⁴⁵—both of which it characterized as “fully consistent” with the Court’s account of English

¹³⁷ *Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1889 (2009) (quoting 18 U.S.C. § 1028A(a)(1) (2006)).

¹³⁸ *Id.* at 1888–89.

¹³⁹ *Id.* at 1890.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 1891.

¹⁴⁴ 513 U.S. 64 (1994).

¹⁴⁵ 471 U.S. 419 (1985).

usage.¹⁴⁶ This characterization is misleading, though. It is true enough that in each case the Court interpreted the word “knowingly” to modify the offense element at issue. In neither case, however, did the Court rely on grammar or usage. In *Liparota*, the Court said that the statute’s language was ambiguous: “[T]he words themselves provide little guidance. Either interpretation would accord with ordinary usage.”¹⁴⁷ Worse, in *X-Citement Video* the Court actually said the grammar suggested the opposite reading: “The most natural grammatical reading . . . suggests that the term ‘knowingly’ modifies only the surrounding verbs . . .”¹⁴⁸

In *Flores-Figueroa*, then, the Court found clear guidance in a grammatical structure that until then had been thought, by the Supreme Court and others, to be ambiguous. It is possible that the Court in *Flores-Figueroa* really did identify a usage rule that all those other courts, and all those prior incarnations of the Supreme Court itself, had overlooked. But a more likely explanation is that the statute’s text just matters more to the Court than it used to.

The text matters, moreover, in a particular way. In *Flores-Figueroa*, the Court’s exclusive reliance on examples from everyday language—in preference to examples from criminal statutes—suggests that the Court’s approach to statutory interpretation is not so much textualist as literalist. Professor Manning has contrasted “modern textualists” with “their literalist predecessors in the ‘plain meaning’ school.”¹⁴⁹ Literalists, he says, “look exclusively for the ‘ordinary meaning’ of words and phrases.”¹⁵⁰ Textualists, by comparison, “emphasize the relevant linguistic community’s (or sub-community’s) shared understandings and practices.”¹⁵¹ In *Flores-Figueroa*, the Court ignored the “shared understandings and practices” reflected in decisions like *Liparota* and *X-Citement Video* in favor of ordinary-language analysis—in favor, that is, of asking what it means to “say that someone knowingly ate a sandwich with cheese.”¹⁵²

B. Criminal Law Doctrine as “Legal Cliche”

It is tempting to suppose that doctrine matters less under the Court’s current approach just because the text matters more; that doctrine has been displaced, rather than affirmatively discounted. After all, to the degree that a court assigns dispositive importance to the text’s “plain meaning,” as the Supreme Court did in *Flores-Figueroa*, the court will have less occasion to advert to the background principles of criminal law. Thus, we could say of *Flores-Figueroa* that the Court’s

¹⁴⁶ *Flores-Figueroa*, 129 S. Ct. at 1891.

¹⁴⁷ *Liparota*, 471 U.S. at 424.

¹⁴⁸ *X-Citement Video*, 513 U.S. at 68.

¹⁴⁹ Manning, *supra* note 42, at 2456.

¹⁵⁰ Manning, *supra* note 97, at 434.

¹⁵¹ *Id.*

¹⁵² *Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1890 (2009).

literalist interpretation of the text obviated resort to background principles—to the presumption against strict liability, for example, or to the associated distinction that formed the basis for Justice Sotomayor’s decision in *Figuerroa*.

But there is more at work in *Flores-Figuerroa* than a newfound regard for the text. *Flores-Figuerroa* reflects, in addition, a kind of open hostility to criminal law doctrine. This hostility is evident, first, in the Court’s discussion of *Liparota*. Again, the Court relied on *Liparota* for the proposition that “courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word ‘knowingly’ as applying that word to each element.”¹⁵³ Though the result in *Liparota* was in fact driven by doctrine, rather than grammar, the Court in *Flores-Figuerroa* tried to convey the opposite impression. The Court depicted *Liparota* as a triumph of ordinary usage over the doctrinal principle that “ignorance of the law is no excuse.”¹⁵⁴ Along the way, the Court gratuitously dismissed this doctrinal principle as a “legal cliché”:

[I]n *Liparota v. United States*, this Court interpreted a federal food stamp statute that said, “‘whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [law]’” is subject to imprisonment. The question was whether the word “knowingly” applied to the phrase “in any manner not authorized by [law].” The Court held that it did, despite the legal cliché “ignorance of the law is no excuse.”¹⁵⁵

The Court’s account of *X-Citement Video* was equally revisionist.¹⁵⁶ The statute at issue in *X-Citement Video* prohibited, among other things, the interstate shipment of child pornography.¹⁵⁷ The principal question in the case was whether the statute’s “knowingly” mental state extended to the fact that the performer was underage.¹⁵⁸ The Court held that it did.¹⁵⁹ This result, though, was driven almost entirely by doctrine—specifically, by the presumption that “elements that criminalize otherwise innocent conduct” require a mental state.¹⁶⁰ Nevertheless, in *Flores-Figuerroa* the Court’s account of *X-Citement Video* made no reference to the doctrinal basis for the decision.¹⁶¹ What is worse, the Court in *Flores-Figuerroa*

¹⁵³ *Id.* at 1891 (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 79 (1994) (Stevens, J., concurring)).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* (alterations in original) (emphasis omitted) (citations omitted).

¹⁵⁶ *See id.*

¹⁵⁷ *X-Citement Video*, 513 U.S. at 67–68.

¹⁵⁸ *Id.* at 68.

¹⁵⁹ *Id.* at 78.

¹⁶⁰ *Id.* at 72.

¹⁶¹ *See Flores-Figuerroa*, 129 S. Ct. at 1891.

affirmatively depicted the result in *X-Citement Video* as another defeat for criminal law doctrine. This time, the denigrated doctrine was the one-time general rule that no mental state attaches to the age element in sex crimes involving children.¹⁶² The Court said of *X-Citement Video*: “[T]he fact that many sex crimes involving minors do not ordinarily require that a perpetrator know that his victim is a minor supported the [g]overnment’s [sic¹⁶³] position. Nonetheless, we again found that the intent element applied to ‘the use of a minor.’”¹⁶⁴

The message of *Flores-Figueroa* is clear, especially in the Court’s gratuitous dismissal of the principle that “ignorance of the law is no excuse” as a “legal cliché.”¹⁶⁵ The Court’s vision of a criminal law written in “ordinary English”¹⁶⁶ also is—not coincidentally—a vision of criminal law purged of doctrine’s taint. The text matters more because doctrine matters less.

Moreover, as *Dean* shows, doctrine matters less even when the text of the statute does not, by itself, provide a clear answer to the interpretive question. In *Dean*, the Court eventually did look behind the statute’s text. It considered, among other things, the fact that the discharge element in 18 U.S.C. § 924(c)(1)(A)(iii) is non-causal.¹⁶⁷ In deciding what significance to assign to this fact, though, the Court scrupulously avoided any encounter with existing doctrine.

This aspect of the Court’s analysis began with the observation that Congress had used the passive voice in defining the discharge element.¹⁶⁸ The statute—instead of requiring that the defendant discharge the firearm—says that the aggravated offense occurs if “the firearm is discharged.”¹⁶⁹ From Congress’s use

¹⁶² See *id.* For evidence of this rule, see *Morissette v. United States*, 342 U.S. 246, 251 n.8 (1952), recognizing that “[e]xceptions [to the presumption against strict liability] came to include sex offenses, such as rape, in which the victim’s actual age was determinative despite [the] defendant’s reasonable belief that the girl had reached [the] age of consent,” and Francis Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 73–74 (1933), which discusses the exception to the presumption against strict liability for crimes involving child sexual abuse.

¹⁶³ In *X-Citement Video*, it was not the government that urged the Court to limit the scope of the “knowingly” mental-state adverb. See Brief for the United States at 39, *X-Citement Video*, 513 U.S. 64 (No. 93–723) (asserting that “18 U.S.C. [§] 2252 [s]hould [b]e construed [t]o [r]equire [k]nowledge [t]hat [t]he [p]roduction [o]f [p]articular [m]aterials [i]nvolved [t]he [u]se [o]f [a] [m]inor [e]ngaging [i]n [s]exually [e]xplicit [c]onduct”). Rather, the argument for limiting the scope of the mental-state adverb came from the defendant, who had persuaded the Ninth Circuit that the statute, so construed, violated the First Amendment. See Respondents’ Brief at 13, *X-Citement Video*, 513 U.S. 64 (No. 93–723) (arguing that “[§] 2252 does not require knowledge of minority status”).

¹⁶⁴ *Flores-Figueroa*, 129 S. Ct. at 1891 (citing *X-Citement Video*, 513 U.S. at 72 & n.2).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ See *Dean v. United States*, 129 S. Ct. 1849, 1853 (2009) (observing that “[i]t is whether something [i.e., the discharge] happened—not how or why it happened—that matters [under § 924(c)(1)(A)(iii)]”).

¹⁶⁸ *Id.*

¹⁶⁹ 18 U.S.C. § 924(c)(1)(A)(iii) (2006).

of the passive voice, the Court inferred that the defendant need not cause the firearm to discharge: “It is whether something happened—not how or why it happened—that matters.”¹⁷⁰ From the fact that the defendant need not cause the discharge, the Court inferred both that the discharge need not be intentional and, more broadly, that the discharge element requires no mental state at all.¹⁷¹

This argument, admittedly, gets behind the statute’s text; it addresses the nature of the discharge element in a way that touches on traditional criminal law concerns.¹⁷² In making this argument, though, the Court pointedly ignored a vast and hoary body of criminal law doctrine that speaks, first, to the distinction between causal and non-causal elements and, second, to the relationship between this distinction and culpability.¹⁷³ The critical premise of the Court’s argument—that non-causal elements require no mental state—was not even articulated, much less supported by authority.¹⁷⁴ The Court proceeded as if nobody ever had considered before the distinction between causal and non-causal elements, or the relationship between this distinction and culpability.

IV. HOW *DEAN* AND *FLORES-FIGUEROA* ILLUSTRATE SHORTCOMINGS IN THE STATUTE-CENTERED APPROACH TO CRIMINAL STATUTORY INTERPRETATION

In this section, I will argue, tentatively, that Justice Sotomayor’s doctrine-centered approach to criminal statutory interpretation deserves to prevail. My argument will have two parts. First, I will use *Flores-Figueroa* to show that dispensing with criminal law background principles is easier said than done—that even the supposedly unambiguous text of the statute at issue in *Flores-Figueroa* fails adequately to define the relationship between the statute’s mental state and its objective elements. Second, I will use *Dean* to show how the turn to doctrine might improve the courts’ reasoning in cases where they look behind the text, to the statute’s purposes and to the policies at stake.

A. *Why Dispensing With Doctrine is Easier Said Than Done*

In *Flores-Figueroa*, the Court appeared to acknowledge that the rules of “ordinary English grammar”¹⁷⁵ would not always define the scope of a criminal statute’s mental-state adverb.¹⁷⁶ Some sentences in criminal statutes, the Court

¹⁷⁰ *Dean*, 129 S. Ct. at 1853.

¹⁷¹ *Id.*

¹⁷² See MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 202–205 (1993).

¹⁷³ See *infra* text accompanying notes 202–05.

¹⁷⁴ See *Dean*, 129 S. Ct. at 1853–54.

¹⁷⁵ *Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1890 (2009).

¹⁷⁶ *Id.* at 1891.

said, “involve special contexts.”¹⁷⁷ But the Court said, referring to 18 U.S.C. § 1028A(a)(1), that “[n]o special context is present here.”¹⁷⁸ And so the interpretation of this statute, at least, is controlled by ordinary usage. The mental-state adverb “knowingly,” the Court implied, modifies “the full object of the transitive verb in the sentence.”¹⁷⁹

Only it doesn’t, or so I will argue here. In this section, I will try to show that the Court’s approach to criminal statutory interpretation does not work even with respect to 18 U.S.C. § 1028A(a)(1) itself. Specifically, I will try to show that, despite the absence in § 1028A(a)(1) of any “special context,” the relationship between the statute’s mental-state adverb and the “full object of the [statute’s] transitive verb”¹⁸⁰ cannot be understood except with the help of criminal law background principles. I will focus on one background principle in particular, namely, the one dismissed by the Court in *Flores-Figueroa* as a “legal cliché”—the principle that “ignorance of the law is no excuse.”¹⁸¹

Suppose the defendant, Flores-Figueroa, decides to raise the following argument on remand to the district court. As interpreted by the Supreme Court in *Flores-Figueroa*, the word “knowingly” in 18 U.S.C. § 1028A(a)(1) applies “to all the subsequently listed elements of the crime.”¹⁸² Among those subsequently listed elements is the requirement that the thing “transfer[red], possess[ed], or use[d]” by the defendant be a “means of identification.”¹⁸³ In order to be guilty of the offense, then, the defendant must “know” that the thing transferred, possessed, or used “is a ‘means of identification.’”¹⁸⁴ As it turns out, the phrase “means of identification” has a statutory definition,¹⁸⁵ so whether something is a “means of

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 1890.

¹⁸³ 18 U.S.C. § 1028A(a)(1) (2006).

¹⁸⁴ *Flores-Figueroa*, 129 S. Ct. at 1890 (“It makes little sense to read the provision’s language as heavily penalizing a person who ‘transfers, possesses, or uses, without lawful authority’ a *something*, but does not know, at the very least, that the ‘something’ (perhaps inside a box) is a ‘means of identification.’”).

¹⁸⁵ 18 U.S.C. § 1028(d) (2006) defines the term “means of identification” as follows:

(7) the term “means of identification” means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any—

(A) name, social security number, date of birth, official State or government issued driver’s license or identification number, alien registration number, government passport number, employer or taxpayer identification number;

(B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(C) unique electronic identification number, address, or routing code; or

identification” depends on whether it satisfies the statutory definition. If, as seems likely, Flores-Figueroa was not familiar with the statutory definition, then he could not have known that the thing he transferred, possessed, or used really qualified as a “means of identification.” So he is not guilty of the offense, regardless of whether he knew the thing belonged to someone else.

Ordinary usage does not provide an answer to this argument. In ordinary usage, knowing what something is often requires knowledge of what words mean, particularly where terms of art—like “means of identification”—are concerned. Were we to say of someone, “He didn’t know that his knife was a butterfly knife,” we might mean that he didn’t know about the physical characteristics that made the knife a “butterfly knife.”¹⁸⁶ But we might also mean that he didn’t know what the term “butterfly knife” means. Likewise, were we to say of someone, “She didn’t know that the defendant had acted with malice aforethought,” we might mean that she hadn’t realized that the defendant intended, say, to inflict grievous bodily injury. But we might also mean that she had not realized that the intent to inflict grievous bodily injury qualifies as malice aforethought.

This very kind of ambiguity arises sometimes in firearms cases. Criminal statutes defining the offense of being a felon in possession of a firearm generally require the government to prove that the defendant “knowingly possess[ed] any firearm.”¹⁸⁷ Defendants charged with this offense sometimes argue that they had not realized that the thing they possessed satisfied the legal definition of “firearm,” and so they could not have “knowingly” possessed a firearm.¹⁸⁸ In *State v. Dolsby*,¹⁸⁹ for example, where the felon-in-possession charge was based on the defendant’s possession of a “muzzle loader,” the defendant, Dolsby, argued that “he thought the muzzle loader was not legally considered a firearm.”¹⁹⁰ Dolsby’s argument has a basis in ordinary English usage. There is a sense in which Dolsby (if he was telling the truth) really did not knowingly possess a firearm.

(D) telecommunication identifying information or access device (as defined in section 1029(e)).

¹⁸⁶ A “butterfly knife” is a folding pocket knife with a two-part handle that folds around the blade and is secured by a latch. See *People v. Quattrone*, 260 Cal. Rptr. 44, 45 (Cal. Ct. App. 1989) (describing the “butterfly knife sold by defendant” in the case). When the latch is released, the “two halves of the sheath . . . swing down on pivots to form a handle exposing the blade.” *Id.*

¹⁸⁷ *Harris v. State*, 137 P.3d 124, 127 (Wyo. 2006) (emphasis added) (quoting WYO. STAT. ANN. § 6–8–102 (2005)). For another example of such a criminal statute, see ALASKA STAT. § 11.61.200(a)(1) (2008), providing that a person commits the offense of weapons misconduct in the third degree if he:

[K]nowingly possesses a firearm capable of being concealed on one’s person after having been convicted of a felony or adjudicated a delinquent minor for conduct that would constitute a felony if committed by an adult by a court of this state, a court of the United States, or a court of another state or territory.

¹⁸⁸ See, e.g., *State v. Dolsby*, 145 P.3d 917, 920 (Idaho Ct. App. 2006); *Harris*, 137 P.3d at 130–31.

¹⁸⁹ 145 P.3d 917 (Idaho Ct. App. 2006).

¹⁹⁰ *Id.* at 920 (emphasis omitted).

This is not to say, of course, that arguments like Dolsby's have carried the day. Courts have rejected arguments like Dolsby's out of hand.¹⁹¹ They have interpreted the statutes to require, in effect, only that the defendant have "knowledge of the relevant physical characteristics"¹⁹²—the physical characteristics that bring the object possessed within the scope of the statute.¹⁹³ The reason for this interpretation, though, has nothing to do with ordinary usage and everything to do with criminal law doctrine. It has to do, in particular, with an important instantiation of the principle that "ignorance of the law is no excuse"—namely, the background rule that "[n]either knowledge nor recklessness or negligence . . . as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless . . . the [statute] so provides."¹⁹⁴

The same background rule is necessary as an aid to defining the scope of the mental-state adverb in 18 U.S.C. § 1028A(a)(1), despite the Court's insistence in *Flores-Figueroa* that "[n]o special context is present here."¹⁹⁵ It is unclear, in the end, exactly what this statute requires by way of knowledge that the object transferred, possessed, or used is a "means of identification." It might be read simply to require that the defendant know that the thing used, transferred, or possessed fits the description of one of the things mentioned in the statutory definition, such as a "date of birth" or a "social security number."¹⁹⁶ Or it might be read to require that the defendant know, in addition, that the thing used, transferred, or possessed qualifies, in the usual colloquial sense, as a "means of identification." But the statute cannot plausibly be read to require that the defendant know that the object falls within the statutory definition of "means of identification," despite the viability of this reading from the perspective of

¹⁹¹ See *Dolsby*, 145 P.3d at 920; *Harris*, 137 P.3d at 130–31 (though statute required proof that convicted felon "knowingly" possessed a firearm, it was not a defense that "he did not think the black powder rifle was considered a firearm due to the information obtained from the store clerk and deputy and the fact that he was able to purchase the gun from a retail store without being subject to a background check"); see also *People v. Berrier*, 637 N.Y.S.2d 69, 69 (N.Y. App. Div. 1996) ("Knowledge that the thing possessed answers the description of one of the prohibited instruments is not an element of third-degree criminal possession of a weapon.").

¹⁹² *People v. Small*, 598 N.Y.S.2d 431, 435 (N.Y. Sup. Ct. 1993); see also *id.* at 432, 436 (citation omitted) (holding that state statute prohibiting the possession of stun guns required the government to prove that "the defendant was aware of possessing the alleged weapon *and* was aware of the physical characteristics of the object which distinguish it as a weapon within the meaning of the statute").

¹⁹³ Cf. *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 524–25 (1994) (in prosecution under federal statute prohibiting the interstate sale of "drug paraphernalia," the government "need not prove specific knowledge that the items [sold] are 'drug paraphernalia' within the meaning of the statute" as "it is sufficient for the [g]overnment to show that the defendant 'knew the character and nature of the materials' with which he dealt").

¹⁹⁴ MODEL PENAL CODE § 2.02(9) (1985).

¹⁹⁵ *Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1891 (2009).

¹⁹⁶ 18 U.S.C. § 1028(d)(7)(A) (2006).

“ordinary English usage.” The rules of ordinary English usage do not suffice to define the relationship between the statute’s mental-state adverb and its objective elements.

B. How Doctrine Helps Courts Interpret Incomplete Statutes

At least where statutes like 18 U.S.C. § 1028A(a)(1) are concerned, then, criminal statutory interpretation requires something more than rules of ordinary English grammar.¹⁹⁷ But why turn to criminal law doctrine, rather than, say, a statute-specific, a-doctrinal analysis of the policies at stake? For example, could not a court resolve the ambiguity I identified in the last section—whether 18 U.S.C. § 1028A(a)(1) requires knowledge of the statutory definition of “means of identification”—merely on the basis of the common-sense observation that the statute, so interpreted, would be unworkable? What does the interjection of doctrinal jargon, or “legal cliché,” really add to the analysis?

There probably are deep reasons—and maybe even constitutional reasons—why reliance on “well-settled background norms”¹⁹⁸ as a guide to criminal statutory interpretation is preferable to ad hoc, statute-specific policy analysis. In this section, though, I will limit myself to a shallow, pragmatic argument—namely, that resort to criminal law doctrine improves the way courts answer questions left unanswered by the text. It does so by establishing a connection to practical wisdom accumulated in past criminal cases and other statutes. I will use *Dean v. United States*¹⁹⁹ as the vehicle for this argument.

In *Dean*, again, the Court did not rely solely on English grammar as the basis for its interpretation of 18 U.S.C. § 924(c)(1)(A)(iii); it also relied on a brief analysis of the nature of the discharge element. From Congress’s use of the passive voice in defining the discharge element of section 924(c)(1)(A)(iii), the Court inferred that the defendant need not cause the firearm to discharge: “It is whether something happened—not how or why it happened—that matters.”²⁰⁰

¹⁹⁷ See Manning, *supra* note 42 (acknowledging that sometimes criminal statutes “do[] not spell out every detail”).

¹⁹⁸ *Id.* at 2468.

¹⁹⁹ 129 S. Ct. 1849 (2009).

²⁰⁰ *Id.* at 1853. It is possible to question even the Court’s classification of the discharge element as non-causal. The Model Penal Code contemplates, as do many state criminal codes, that some words in criminal statutes will describe not “results” or “circumstances” but, rather, “conduct.” See MODEL PENAL CODE § 1.13(9) (1985) (providing that phrase “element of an offense” encompasses conduct elements, attendant-circumstance elements, and result elements); see also, e.g., ARK. CODE ANN. § 5-1-102(5) (Supp. 2009); ME. REV. STAT. ANN. tit. 17-A, § 32 (Supp. 2009). Dean’s attorney could have argued plausibly that, despite Congress’s use of the passive voice, the discharge element is a conduct element, rather than a result or circumstance element. If Congress had meant the element to operate as a circumstance or result, it would have said not “the firearm is discharged,” but rather “the firearm discharges” (circumstance) or “the defendant causes the firearm to discharge” (result). Cf. MICH. COMP. LAWS ANN. § 750.327 (West 2004) (emphasis omitted) (providing that a person commits the offense of “[d]eath due to explosives” when he carries an

Then, from the fact that the defendant need not cause the firearm to discharge, the Court inferred both that the discharge need not be intentional and, more broadly, that the discharge element requires no mental state at all.²⁰¹

Criminal law doctrine has a name for elements that hinge only on “whether something happened—not why or how it happened.” These elements are known as “circumstance” elements. This distinction—between causal and circumstance elements—has been around at least since Bentham,²⁰² and plays an important part in the Model Penal Code, which distinguishes “result” elements from “attendant circumstance[.]” elements.²⁰³ Under the Model Penal Code, a condition or event is a “result” element if the government must prove that the defendant caused the condition or event to exist or occur.²⁰⁴ By contrast, if the government need not prove that the defendant caused the condition or event to exist or occur, the element is an “attendant circumstance[.]” element.²⁰⁵

In *Dean*, of course, the Court spotted the distinction even without the help of the criminal law’s terminology of “result” and “circumstance.” What difference would it have made, then, if the Court had invoked this terminology? The answer is that putting a name to the relevant distinction might have connected the Court to a body of criminal law doctrine, and this body of doctrine might have informed the Court’s use of the distinction. Criminal law doctrine associated with the distinction between result and circumstance elements casts light on both inferences drawn by the Court from its determination that the discharge element is non-

explosive substance onto a public conveyance and the “explosive substance explodes and destroys human life”). In both of these two alternative formulations, the discharge is something the gun does. In the statutory phrase “the firearm is discharged,” by contrast, the discharge is something that someone does to the gun; it is conduct, in other words. See 18 U.S.C. § 924(c)(1)(A)(iii) (2006). At most, Congress’s use of the passive voice in § 924(c)(1)(A)(iii) indicates that the person doing the discharging—the person engaging in the proscribed conduct—need not be the defendant. See *id.*

²⁰¹ *Dean*, 129 S. Ct. at 1853–54.

²⁰² See JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 88 (Prometheus Books 1988) (1781).

²⁰³ MODEL PENAL CODE § 1.13(9) (1985).

²⁰⁴ See *id.* § 1.13(9)(iii) (describing this kind of element as “result of conduct”); *id.* § 2.02(2)(b)(ii) (describing element as “a result of his [the actor’s] conduct”); *id.* § 2.03(1) (defining causation by identifying the conditions under which “[c]onduct is the cause of a result”); see also Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 BUFF. CRIM. L. REV. 225, 238 (1997) (arguing that the “spirit and intention” of the Code’s drafters can best be captured by defining “result” element to mean any element that must be caused by the defendant’s conduct).

²⁰⁵ Schwartz G. Abrams, *Comment on Proof and Presumptions: Section 103*, in I WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 11, 12 n.* (1970) (explaining that the phrase “attendant circumstances” was intended to capture elements “which, although not truly ‘conduct,’ are nevertheless required to be proved [sic] the requirement that the person bribed be a ‘public servant,’ for example, or that the espionage take place in time of war”).

causal—its inference that the element “does not require proof of intent,”²⁰⁶ and its inference that the element requires no mental state at all.²⁰⁷

First, criminal law doctrine vindicates the Court’s inference that “subsection (iii) [of 18 U.S.C. § 924(c)(1)(A)] does not require proof of intent.”²⁰⁸ Doctrine teaches that criminal statutes rarely require proof that the actor acted intentionally with respect to circumstance elements—an actor usually need not “intend a circumstance.”²⁰⁹ This teaching is reflected in state criminal codes, many of which permit the mental state of purposely or intentionally to be assigned only to result and conduct elements—not to circumstance elements.²¹⁰ New York’s penal law is

²⁰⁶ *Dean*, 129 S. Ct. at 1853.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ S. COMM. ON THE JUDICIARY, 94TH CONG., CRIMINAL JUSTICE REFORM ACT OF 1975, at 54 n.13 (Comm. Print 1975) (“[T]he absence [from the draft federal criminal code] of the mental state ‘intentional’ in reference to an existing circumstance is based on the definition of intentional. One can intend or determine to engage in conduct or to cause a result but cannot ‘intend’ a circumstance.”). Philosophers and lawyers disagree about why, exactly, the mental state of intentionally does not ordinarily attach to circumstance elements. Bentham argued simply that “the circumstances [of an act] are no objects of the intention.” BENTHAM, *supra* note 202. The drafters of the proposed federal criminal code reached the same conclusion: “One can intend or determine to engage in conduct or to cause a result but cannot ‘intend’ a circumstance.” S. COMM. ON THE JUDICIARY, 94TH CONG., CRIMINAL JUSTICE REFORM ACT OF 1975, at 54 n.13 (Comm. Print 1975). Michael Moore has argued, however, that the reason why the mental state of intentionally does not ordinarily attach to circumstance elements is a moral one, rather than a psychological or semantic one. See MOORE, *supra* note 172, at 204. Where circumstance elements are concerned, he argues that knowledge and intent are equally culpable, and so it would make little sense specifically to require intent, as distinguished from knowledge. *Id.*

²¹⁰ See, e.g., CONN. GEN. STAT. § 53a-3(11) (2009) (“A person acts ‘intentionally’ with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.”); 720 ILL. COMP. STAT. 5/4-4 (2008) (“A person intends, or acts intentionally or with intent, to accomplish a result or engage in conduct described by the statute defining the offense, when his conscious objective or purpose is to accomplish that result or engage in that conduct.”); KY. REV. STAT. ANN. § 6.616(1) (West 2010) (“A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause that result or to engage in that conduct.”); MO. REV. STAT. § 562.016(2) (2000) (“A person ‘acts purposely’, or with purpose, with respect to his conduct or to a result thereof when it is his conscious object to engage in that conduct or to cause that result.”) (emphasis omitted); MONT. CODE ANN. § 45-2-101(65) (2009) (“[A] person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is the person’s conscious object to engage in that conduct or to cause that result.”); N.H. REV. STAT. ANN. § 626:2(II)(a) (2007) (“A person acts purposely with respect to a material element of an offense when his conscious object is to cause the result or engage in the conduct that comprises the element.”); N.Y. PENAL LAW § 15.05(1) (McKinney 2009) (“A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.”) OR. REV. STAT. § 161.085(7) (2009) (“‘Intentionally’ or ‘with intent,’ when used with respect to a result or to conduct described by a statute defining an offense, means that a person acts with a conscious objective to cause the result or to engage in the conduct so described.”); TENN. CODE ANN. § 39-11-106(18) (Supp. 2009) (“‘Intentional’ means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the

representative.²¹¹ Its definition of “intentionally” provides that “[a] person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.”²¹² It makes no provision for situations where the mental state of intentionally is assigned to circumstance elements, and so it tacitly precludes this assignment.²¹³

If doctrine would have vindicated the Court’s inference that the discharge element does not require “intent,” though, it would have undercut the Court’s broader inference that the discharge requires no mental state at all. The fact that a particular element is a circumstance tells us nothing about whether a mental state other than intentionally—knowingly, for example, or recklessly—is required by the statute.²¹⁴ This is evident in the Model Penal Code,²¹⁵ the draft federal criminal code,²¹⁶ and even in the Supreme Court’s own decisions.²¹⁷ Consider, for example, *Staples v. United States*,²¹⁸ where the Court was called upon to interpret a federal

person’s conscious objective or desire to engage in the conduct or cause the result.”); TEX. PENAL CODE ANN. § 6.03(a) (West 2003) (“A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.”); UTAH CODE ANN. § 76-2-103(1) (LexisNexis 2008) (“A person engages in conduct . . . [i]ntentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.”)

²¹¹ N.Y. PENAL LAW § 15.05(1) (McKinney 2009).

²¹² *Id.*

²¹³ Interestingly, other states have adopted even narrower definitions of “intentionally,” which permit this mental state to be assigned only to result elements. *See, e.g.,* ALASKA STAT. § 11.81.900(a)(1) (2008) (providing that “a person acts ‘intentionally’ with respect to a result described by a provision of law defining an offense when the person’s conscious objective is to cause that result”); COLO. REV. STAT. § 18-1-501(5) (2009) (“A person acts ‘intentionally’ or ‘with intent’ when his conscious objective is to cause the specific result proscribed by the statute defining the offense.”).

²¹⁴ Dean argued that a mental state of knowingly was appropriate. *See* Brief for the Petitioner at 26, *Dean v. United States*, 129 S. Ct. 1849 (2009) (No. 08-5274). One federal court of appeals had concluded, in substance, that a reckless mental state was appropriate. *See United States v. Brown*, 449 F.3d 154, 158 (D.C. Cir. 2006), *abrogated by Dean*, 129 S. Ct. 1849.

²¹⁵ *See* MODEL PENAL CODE § 2.02(1) (1985) (providing that “a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense”).

²¹⁶ *See* S. COMM. ON THE JUDICIARY, 94TH CONG., CRIMINAL JUSTICE REFORM ACT OF 1975, at 59 (Comm. Print 1975) (explaining that under proposed federal criminal code, “[w]here a state of mind does not immediately introduce an *actus reus* element of an offense, the state of mind which must be proved with respect to conduct is knowing and to an existing circumstance or a result is reckless”).

²¹⁷ *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 65–66 (1994) (interpreting federal statute to require proof that the defendant knew the performers in pornographic movie were underage); *Staples v. United States*, 511 U.S. 600, 602, 619 (1994) (interpreting federal statute to require proof that the defendant knew the firearm in his possession was fully automatic).

²¹⁸ 511 U.S. 600 (1994).

criminal statute prohibiting the possession of an unregistered machinegun.²¹⁹ The question in *Staples* was whether the statute, which was silent with respect to mens rea, should nevertheless be interpreted to require proof that the defendant knew the gun was capable of functioning as a machinegun.²²⁰ The objective element at issue in *Staples*—the gun’s capacity to fire automatically—obviously was a circumstance element; the statute was indifferent to whether the defendant himself had caused the gun to be capable of firing automatically.²²¹ Still, the Court held that this element required a mental state of knowingly.²²²

Dean illustrates how doctrine enables courts to learn from experience. Under a doctrine-centered approach to statutory interpretation, the Court’s identification of the discharge element as a circumstance would have fostered an encounter with a vast body of accumulated wisdom—from Bentham through Herbert Wechsler, and encompassing finally even the Court’s own decisions. The Court might have concluded nevertheless that the discharge element did not require a mental state. It might have refined its explanation of the critical inference—perhaps by identifying a reason why this particular circumstance element requires no mental state.²²³ It could not, however, have reasoned as it did under a doctrine-centered approach. In the light cast by experience, the Court’s inference—from the mere fact that the discharge is non-causal to the conclusion that the discharge requires no mental state—is plainly wrong.

V. CONCLUSION

Justice Sotomayor’s opinion for the Second Circuit in *Figueroa* has shortcomings of its own, of course. But the problems with *Figueroa* have less to do with Justice Sotomayor’s method—which is fundamentally sound, I think—than with the poverty of her conception of the criminal law background. The criminal law offers more, and better, tools for classifying elements than the distinction between “elements that criminalize otherwise innocent conduct”²²⁴ and elements that make criminal conduct more serious.²²⁵

A better tool for classifying elements was at work in Justice Stevens’s dissenting opinion in *Dean*, for example. Justice Stevens would have held that the

²¹⁹ *Id.* at 602, 604.

²²⁰ *Id.*

²²¹ *Id.* at 602.

²²² *Id.* at 619.

²²³ *Cf.* *State v. Andrews*, 27 P.3d 137, 141 (Or. Ct. App. 2001) (holding that a circumstance element requires a mental state if and only if it “transforms otherwise innocent conduct into criminally culpable conduct”).

²²⁴ *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994).

²²⁵ *See, e.g., id.* at 73 (identifying “the age of the performers” in child pornography statute as an “element separating legal innocence from wrongful conduct”).

discharge element in 18 U.S.C. § 924(c)(1)(A)(iii) requires a mental state.²²⁶ In support of this conclusion, he offered a not-quite-novel refinement of the distinction between elements that make conduct criminal and elements that make criminal conduct more serious.²²⁷ The real distinction, he said, is between elements that measure “the seriousness of the harm caused by the predicate act” and elements that measure instead the degree of risk posed by the defendant’s conduct—elements like the discharge element in 18 U.S.C. § 924(c)(1)(A)(iii), for example.²²⁸ Elements of this second kind, he argued, usually cannot justify increased punishment unless the government is required to prove an associated mental state.²²⁹ Elements of the first kind sometimes can.²³⁰

This is not the place to defend Justice Stevens’s refinement of the presumption against strict liability. I mention Justice Stevens’s argument only because it illustrates what I like best about the doctrine-centered approach to criminal statutory interpretation—namely, its promise of progress in criminal law. In the preexisting doctrinal distinction between elements that make conduct criminal and elements that make crimes worse, Justice Stevens found a kernel of truth—namely, that elements “permit[ting] increased punishment based on the seriousness of the harm” sometimes do not require mental states.²³¹ But he was able to perceive, in the context of the *Dean* case, a critical limitation on the preexisting principle—namely, that elements designed to measure the magnitude of risk usually require mental states, even if they only make the actor’s crime worse.²³²

Not only, then, does doctrine inform the resolution of current cases by connecting the courts to what others have said about the same topic. The encounter with doctrine in the context of particular cases promotes the gradual refinement of doctrine and so promotes the just resolution of future cases. By

²²⁶ *Dean v. United States*, 129 S. Ct. 1849, 1857, 1860 (2009) (Stevens, J., dissenting).

²²⁷ *Id.* at 1859. I say “not-quite-novel” because this distinction closely tracks the traditional distinction between elements that define the “proscribed act” and elements that define an “additional consequence.” *People v. Hood*, 462 P.2d 370, 378 (Cal. 1969) (using this distinction to define the derivative distinction between general-intent crimes and specific-intent crimes). Since “proscribed act” encompasses every objective element that falls short of the ultimate harm at which the statute is targeted, *see, e.g., People v. Overman*, 24 Cal. Rptr. 3d 798, 806 (Cal. Ct. App. 2005), it encompasses, in effect, everything that makes the conduct riskier. In contrast, an element will count as an “additional consequence” if it measures the social harm at which the statute is targeted. *See, e.g., People v. Hesslink*, 213 Cal. Rptr. 465, 470–71 (Cal. Ct. App. 1985) (holding that the element of “obtain[ing] property of another” in extortion statute qualified as an “additional consequence”).

²²⁸ *See Dean*, 129 S. Ct. at 1859 (Stevens, J., dissenting).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Cf. FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 115 (2009) (explaining that the idea behind the common law is that the “courts will sometimes perceive in the context of a particular case that the preexisting rule is in need of large-scale change or small-scale modification”).

contrast, the majority's decisions in *Dean* and *Flores-Figueroa*, just as they say nothing about criminal law's past, contribute nothing to criminal law's future, either.²³³

²³³ *Flores-Figueroa*, which was decided just five days after *Dean*, does not cite *Dean*, despite the striking similarity of the issues in the two cases.

